Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-741

MIZOKAMI BROS. OF ARIZONA, INC., an Arizona Corporation, *Petitioner*

v.

BAYCHEM CORPORATION, a New Jersey corporation; BAYER DE MEXICO, S.A., a corporation of the United States of Mexico; and BAYER A.G., a corporation of the Federal Republic of Germany, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Mizokami Bros. of Arizona, Inc., respectfully prays that a Writ of Certiorari issue to review the opinion, judgment and order of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 556 F.2d 975. It is set forth in Appendix A-1. The District Court for the District of

Arizona did not write an opinion. It entered two Judgments dismissing the complaint as to all Respondents, for lack of jurisdiction, which are set forth at A-6-8.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 7, 1977. A timely Motion for rehearing was denied on 26 August, 1977, and this Petition for Certiorari was filed within 90 days of that date. The order denying the motion for rehearing is set forth at A-5. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a District Court, since the passage in 1948 of 28 U.S.C. 1404(a), has the power to dismiss a Complaint on the ground of *forum non conveniens*?

2. In the alternative, whether the District Court abused its discretion in dismissing the Complaint as to Respondent Baychem on the ground of *forum non conveniens* when (a) Petitioner is an Arizona corporation and a citizen of the United States; (b) Baychem is a New Jersey Corporation doing business in Arizona and a U.S. citizen; (c) the claim arose out of events occurring in Arizona; (d) the convenience of witnesses favors Arizona; (e) the statute of limitations has run in Mexico, and also in Arizona due to delays in the Courts below; and (f) there is no other forum in which the action may be brought?

3. Whether there were minimum due process contacts in Arizona of Respondents, Bayer de Mexico and Bayer A.G., when Bayer A.G. purchased the Tamaron, an insecticide, from Baychem in the United States and sold it to Bayer de Mexico, whose distributor sold it to Petitioner in Arizona for delivery in Mexico, said Respondents knowing that some of the said Tamaron would be shipped from Mexico into Arizona on Petitioner's bell peppers and would be found in Arizona to violate U.S. law?

4. Whether there were minimum due process contacts in Arizona when Bayer de Mexico and Baychem, a New Jersey corporation doing business in Arizona, were agents of each other?

5. Whether there were minimum due process contacts in Arizona of Bayer A.G., when it dominated and controlled its subsidiary, Baychem which does business in Arizona, and when Bayer A.G. set the standards worldwide for the use of Tamaron on vegetables.

THE CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides in part:

> "No person shall . . . be deprived of life, liberty, or property without due process of law;" . . . .

THE STATUTORY PROVISIONS INVOLVED

28 U.S.C. 1404(a) provides as follows:

> *§ 1404. Change of Venue*:
>
> "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

28 U.S.C. 1332(a)(1) and (c) provide in part as follows:

> "§ *1332; Diversity of Citizenship; Amount in Controversy; Costs.*
>
> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;
>
> (2) citizens of a State, and foreign states or citizens or subjects thereof;"
>
> * * *
>
> "(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business:"

The Arizona long-arm Statute, revolving around whether Respondents caused "an event to occur" in Arizona, provides as follows (Arizona Rules of Civil Procedure, sec. 4(e)(2) (1956)):

> "When the defendant is a resident of the state, or is a corporation doing business in the state; *or is a person,* partnership, corporation or unincorporated association subject to suit in a common name *which has caused an event to occur in this state out of which the claim which is the subject of the complaint arose,* service may be had as herein provided, and when so made shall be of the same effect as personal service within the state." (Emphasis added)

STATEMENT OF THE CASE

This is a diversity case founded on 28 USC 1332(a). Petitioner, Mizokami Bros. of Arizona, Inc. is an Arizona corporation with its principal place of business in Nogales, Arizona and is a citizen of the United States (6, 1096).[1] Among other things, it finances the growing of crops in Mexico for importation into the United States (7).

Respondents are part of the Bayer World Group. Bayer A.G. is the parent company. Baychem is the U.S. manufacturing subsidiary of Bayer A.G. It is a New Jersey Corporation with its principal place of business in New York, and has five plants in the United States (648). It does business in Arizona (100, 236, 274, 275). Bayer de Mexico is the Mexican subsidiary of Bayer A.G.

Bayer A.G. developed and patented the product Tamaron, a chemical pesticide. It centrally dominated, controlled, and set the standards for manufacture and sale of Tamaron by Baychem and Bayer de Mexico (10, 360, 706, 1023, 1310, 1311, 1325-1328). Bayer A.G. dominated and controlled its subsidiary, Baychem (1265-1270).

Baychem manufactured the active chemical ingredients of Tamaron in the United States. Bayer A.G. bought the chemical ingredients for Tamaron, and also purchased Tamaron in finished form, from Baychem and then resold the said ingredients and the Tamaron to Bayer de Mexico (10, 11, 209, 289, 290, 298, 310, 313, 361, 776, 1004, 1005, 1015, 1269, 1410).

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[1] Parenthetical citations refer to the page number in the record on appeal to the Court below.

Baychem and Bayer de Mexico are the agents of each other (10, 18, 26). Under the Agreement between the Chemagro division of Baychem dated 15 January 1973, Bayer de Mexico was constituted the "mediator", that is, the intercessor, interagent and agent of Chemagro with regard to the sale of Chemagro agricultural products, including Tamaron, in Mexico. Also, under the Agreement, Bayer de Mexico agreed to obtain orders from purchasers in Mexico to buy Chemagro products, but was not given the power to accept those orders in Mexico. Indeed, the orders so obtained in Mexico by Bayer de Mexico could only be accepted by Chemagro in the United States (289, 290, 999, 1000, 1356-1359). Hence, Bayer de Mexico and Baychem became the agents of each other in connection with the sale of agricultural products in Mexico, including Tamaron. Thus, such acts of Bayer de Mexico and Baychem, Chemagro became binding on each other.

In addition, Bayer de Mexico received instructions, technical information, and "technical material" regarding the proper use of insecticides, including Tamaron, from Bayer A.G. and Baychem (11, 12, 25, 149, 210, 222, 773, 776).

Petitioner financed growers in Mexico, advancing them funds for the growing of bell peppers and other vegetables (7). During the growing season 1972-1973, Petitioner advanced $1 million to finance the growing of vegetables, including 250 acres of bell peppers in Mexico destined for importation into Arizona (16,1047, 1052, 1057). Title to the bell peppers vested at all times in Petitioner. (7)

Petitioner purchased the Tamaron from Vamex, Bayer de Mexico's distributor, by checks drawn on an

Arizona bank, for delivery in Mexico (1049, 1060). All the Respondents knew that such Tamaron was being purchased by Petitioner for use on peppers grown for export into Arizona and for consumption in the United States and Canada, and that it was necessary for the U.S. Environmental Protection Agency (EPA) to establish tolerances for the use of Tamaron on bell peppers (17-19). Indeed, Respondents both expressly and impliedly warranted that Tamaron was suitable for use on Petitioner's bell peppers intended for importation into Arizona (23, 27).

The Federal Insecticides, Fungicide, and Rodenticide Act, 7 U.S.C. 135 et seq., and the Federal Food Drug and Cosmetic Act, 21 U.S.C. 301, 331, prohibit the shipment in interstate commerce of a pesticide for which no tolerance for a specified commodity has been established.

The Events Which Occurred in Arizona:

A railroad runs from Los Mochis, in the Mexican State of Sinaloa, to Nogales, Mexico, which is across the border from Nogales, Arizona. Petitioner's bell peppers were shipped in vans, that is, truck trailers carried piggyback on that railroad from Los Mochis to Nogales, Mexico. There three individual trailers were unloaded from the train and were hauled by tractors through the international gate and across the border into Nogales, Arizona (779, 1193).

When Petitioner's bell peppers containing Tamaron arrived in these trailers in interstate commerce in Nogales, Arizona, these events occurred in Arizona:

(a) In Nogales, Arizona, the FDA took samples of Petitioner's bell peppers located in Arizona, conducted

tests, and determined that there was no established tolerance for the Tamaron contained in Petitioner's said bell peppers and that the shipments violated U.S. laws (20, 21, 779, 780);

(b) In Nogales, Arizona, the FDA directed that Petitioner's bell peppers which had been imported into Arizona be destroyed, and they were destroyed (20, 21, 779);

(c) In Nogales, Arizona, the FDA caused an embargo to be placed by U.S. Customs on the further importation of bell peppers into the United States (20, 22, 779-781); and

(d) In Nogales, Arizona, the FDA notified Petitioner, at his office in Nogales, Arizona, that an embargo had been placed by U.S. Customs on the further importation of peppers into Arizona, and that no further peppers would be importable into Arizona (20, 21, 779).

(e) In Nogales, Arizona, Petitioner directed that further exportation of peppers from Mexico to Arizona cease immediately (20, 1069).

Meanwhile, in Nogales, Arizona, some reshipment had taken place. The bell peppers that had arrived at Petitioner's warehouse in Nogales, Arizona were all unloaded, and some were then re-loaded in trucks and shipped to Canada (20, 1069). There they were rejected by the Canadian authorities under Canada's reciprocity agreement with the U.S., were required to be destroyed, and were destroyed (20, 1055, 1056, 1069, 1179-1184, 1193).

Because of the embargo caused in Arizona to be placed prohibiting the importation of bell peppers into

the United States, a major part of Petitioner's peppers grown in Mexico could not be imported and had to be destroyed (20, 1069).

Petitioner brought suit against Baychem, Bayer de Mexico and Bayer A.G. in the United States District Court for the District of Arizona on grounds of product liability, misrepresentation, and breach of warranty, and sought damages in the amount of $3,000,000.

The Convenience of Witnesses Favors Arizona:

The convenience of witnesses favors Arizona. First, Petitioner and its main witnesses who have a general knowledge of the case, Richard Kellett, Mike Mizokami and Tom Mizokami are available there.

Second, all other witnesses who can testify to the events which occurred in Arizona are located in Arizona. Petitioner's documents showing the bell pepper crops imported into the United States, are located in Arizona (1091). Also, Petitioner's broker, William Joffroy, who can testify as to transactions with the FDA in Arizona, is located there (779).

Douglas Payne, the FDA supervisor is also located in Arizona. He was in charge of the portable FDA laboratory in Nogales, and made the determinations that the Tamaron which had arrived in Arizona on Petitioner's bell peppers violated U.S. law (780, 1232). The U.S. Government records showing the seizure of the peppers in Arizona, are located in Arizona (1086).

Kellett and Mike Mizokami can also testify as to the re-loading in Arizona of some of the bell peppers for shipment to Canada, and their rejection by the Canadian authorities, with resulting destruction.

As for the destruction of the peppers in Arizona and Mexico, Kellett and Tom Mizokami directed their destruction (1069, 1072, 1076).

Baychem witnesses, such as Charles Roevner, Dr. Andersen and others, are located in Arizona or the United States. The technicians of the Harris Laboratory, which tested the Tamaron, are located in Arizona. (781, 783).

Kellett, Mike Mizokami and Tom Mizokami visited the growing area in Mexico frequently, and are fully familiar with the events which took place there. They are also familiar with the application of Tamaron on the peppers in Mexico, the shipments of the bell peppers into Arizona, etc. Copies of the Bayer de Mexico literature recommending Tamaron on bell peppers are already in the record. (36-43)

Some other testimony of events occurring in Mexico may be needed. But in quantity and quality, testimony as to events in Mexico will not compare with the evidence of the controlling events which occurred in Arizona that will be required.

The Statutes of Limitations Have Run:

Meanwhile, the short Statute of Limitations in Mexico has run (1278, 1406). The four year Statute of Limitations in Arizona has also run because of the delays in the Courts below. 12 A.R.S. 544, 550.

The Decisions of the Courts Below:

Over 4 years have elapsed since the Complaint was filed on 26 October 1973 (6). Over 18 months thereafter, on 27 May 1975, the District Court "dismissed"

the complaint, with costs (1412, 1414). It wrote no opinion (1412-1415).

The case then took over two more years to reach the Court of Appeals for the Ninth Circuit. On 7 July 1977, that Court affirmed the District Court in a short opinion. It admitted that the case was novel as to Baychem and that there was no precedent for its extreme decision. It cited no precedent (A-3).

As to Baychem, the Court below affirmed the dismissal of the Complaint against Baychem, on the ground of *forum non conveniens.* It admitted that "a defendant must carry an almost impossible burden in order to deny a citizen access to the courts of this country". Then, however, the Court below proceeded to make astounding errors. Among others, it stated that "all transactions between the parties, as well as the claim itself, arose in Mexico". It further stated that "The only effect alleged in Arizona was the loss to Mizokami when the chemically treated vegetables failed to gain entry into the United States."

Indeed, these are colossal errors. The undisputed facts show that the claim arose, not in Mexico, but in Arizona and because of a finding that Petitioner's bell peppers containing Tamaron, having arrived in Arizona, were there held to violate U.S. laws. It was in Arizona that the chemicals formulated by Respondents exploded in a legal sense and created the catastrophe out of which the claim arose. Moreover, in Arizona Petitioner ordered the Tamaron from Vamex, the distributor or agent of Bayer de Mexico, paying by checks drawn on an Arizona bank (1049, 1060).

The Court below also erroneously stated (A-1) that Petitioner sustained losses "when United States

Customs Officers turned back a shipment of bell peppers at the Mexican border". But no U.S. Customs Officer ever turned back a shipment of Petitioner's bell peppers at the Mexican border or anywhere else. See p. 7, 8.

The Court also made the amazing statement (page A-2) that "the business done in Arizona by Baychem was unrelated to the claim". The fact is that Baychem sold the very Tamaron in question to Bayer A.G. for delivery to Bayer de Mexico, knowing that some of the Tamaron so sold would be imported into Arizona on Petitioner's peppers. Moreover, Baychem was selling, in Arizona as "Monitor 4", the very chemical sold in Mexico as Tamaron. Monitor 4 had been registered in the U.S. for certain other crops, but not for peppers. Thus, Baychem had not, in March 1973 been caught for its failure to register Monitor 4 on bell peppers in connection with its Arizona business (1233). Hence, when Baychem was finally jolted into applying for a registration of Tamaron, it also applied for the registration of Monitor 4 (966).

The Court Below Erroneously Described Baychem as a "Foreign Opponent" of Petitioner:

The Court below also erroneously stated, in a reference to Petitioner (A-4), that "when their foreign operations lead to litigation they cannot expect always to bring their *foreign opponents* into a United States forum. . . (Emphasis added). The implication is that Baychem is a "foreign opponent", of Petitioner. But such a characterization is another astounding error. Baychem is a New Jersey corporation doing considerable business in Arizona and a citizen of the United States. The Court below simply confused Bay-

chem, the U.S. subsidiary, with the corporations organized under the laws of foreign countries, Bayer A.G. and Bayer de Mexico. Then, apparently on the theory that Baychem was a corporation organized under the laws of a foreign country, the Court below dismissed the complaint as to Baychem on the ground of *forum non conveniens.*

Moreover, it was not the "foreign operations," but the events caused by Respondents to occur in Arizona that created liability and the litigation. These included the event that the chemicals arriving in Arizona which had been furnished by Respondents, were found to violate U.S. law.

As to Bayer de Mexico. The Court below erroneously held that Petitioner merely "alleges that Bayer de Mexico knew or should have known that the chemical would be used on crops intended for United States markets, including Arizona. These allegations do not provide the minimum contacts required by the Due Process Clause for personal jurisdiction". On its face, we submit that this cryptic statement is in error. In addition, the Court below simply failed to absorb the allegations of the Complaint. The Complaint alleged that all the Respondents furnished chemical insecticides to Petitioner in Mexico, knowing that Tamaron would be imported into Arizona on Petitioner's bell peppers. Then when Respondents' chemicals arrived in Arizona aboard Petitioner's bell peppers, they exploded in Arizona—not physically, but in a legal sense —for in Arizona the chemicals were determined to violate U.S. laws. These facts satisfy the due process clause. See post, p. 18-22.

As to Bayer A.G., the Court below merely dismissed the Complaint. It made no mention of the fact that all the Tamaron in Mexico was furnished by Bayer A.G. to Bayer de Mexico, knowing that some of it would wind up on Petitioner's bell peppers imported into Arizona, and there violate U.S. law. Nor did it mention the other undisputed facts set forth above, p. 5-9.

In addition, Bayer A.G. dominates and controls its subsidiaries and agents, Baychem and Bayer de Mexico (10, 1265-1270). And Bayer A.G. set the standards for the use on vegetables of Tamaron distributed by Bayer de Mexico. See page 5.

REASONS FOR GRANTING THE WRIT

I. THE COURT BELOW HAS DECIDED FEDERAL QUESTIONS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

A. Under This Court's Decisions, The District Court Had No Power to Dismiss a Complaint Under 28 U.S.C. 1404(a):

In dismissing the complaint against Baychem on the ground of *forum non conveniens*, the decision of the Court below is in conflict with this Court's decision on April 11, 1955, in *Norwood* v. *Kirkpatrick*, 349 U.S. 29, 99 L. Ed. 789, 75 S. Ct. 544 (1955). That case held that the power to dismiss cases on the ground of *forum non conveniens* was eliminated by the enactment of 28 U.S.C. 1404(a). It said:

> "When Congress adopted § 1404(a), it intended to do more than just codify the existing law on forum non conveniens. As this Court said in Ex parte Collett, 337 US 55-61, 93 L ed 1207-1211, 69 S Ct 944, 959, 10 ALR2d 921, Congress, in writing § 1404(a), which was an entirely new section, was

> revising as well as codifying. *The harshest result of the application of the old doctrine of forum non conveniens, dismissal of the action, was eliminated by the provision in § 1404(a) for transfer.* When the harshest part of the doctrine is excised by statute, it can hardly be called mere codification." (Emphasis added) 349 U.S. 32.

B. The Circuits Are in Conflict as to Whether a District Court Has Power to Dismiss a Complaint on the Ground of Forum Non Conveniens:

A conflict exists in the Circuits. In the Second, Third, and Eighth Circuits some cases have followed the holding in the *Norwood* case that under 28 USC 1404(a) there is no power to dismiss the case on the ground of *forum non conveniens*. *Collins* v. *American Auto Ins. Co. of Missouri*, 230 F.2d 416. (2d Cir., 1956) *B.M. Heede Inc.* v. *West India Machinery & Supply Co.*, 272 F. Supp. 236 (DCNY, 1967). *Harboldt* v. *Carpenter* (C.A. 8, 1976), 536 F.2d 791. *Kisco* v. *Penn Central Transp. Co.*, 408 F. Supp. 984 (DC, ND Pa., 1976).

Since April 11, 1955, the date of the *Norwood* decision, cases in the Ninth and Fourth Circuits, and some cases in the Second Circuit, have dismissed complaints on the ground of *forum non conveniens* where the parties were foreign nationals and the claim arose in a foreign country. *Yerostathis* v. *A. Luisi, Ltd.* (C.A. 9, 1967), 380 F.2nd, 377; *Prack* v. *Weissinger* (C.A. 4, 1960), 276 F.2d 446; *Vanity Fair Mills, Inc.* v. *T. Eaton Co.* (C.A. 2, 1956), 234 F.2d 633 and see *Levin* v. *Mississippi River Corp.* (D.C.N.Y., 1968), 289 Fed. Sup. 353. But no case has ever dismissed a complaint on that ground where, as in our case, both parties are United States citizens and the claim arose in the United States.

C. The Decision Below Raises Significant and Recurring Problems Concerning Efforts to Invoke Federal Diversity Jurisdiction:

The decision below raises significant problems concerning efforts to invoke Federal diversity jurisdiction. The right of a citizen of the United States to sue another citizen of the United States in a diversity case where there is a foreign element, is now in serious jeopardy. Unless precluded by this Court, now there will be more motions to dismiss complaints where there is a foreign element in cases between U.S. citizens, and more appeals. Thus the decision below must necessarily give rise to further litigation and confusion. Hence, we submit that the questions raised should be settled by this Court and unnecessary litigation prevented.

D. In the Alternative, In Dismissing as to Baychem, The Court Below Abused Its Discretion:

The Court below admitted that its decision dismissing the complaint as to Baychem on the ground of *forum non conveniens* was novel. See A-3. But it is more than novel. It is utterly unsupported by precedent or by principle. Moreover, it was based on the misconception that Baychem was a "foreign opponent", rather than a New Jersey corporation doing business in Arizona and a U.S. citizen.

In addition, the decision below is *Gulf Oil Corporation* v. *Gilbert,* 330 U.S. 501, 91 L. Ed. 1055, 67 S. Ct. 839 (1947) in reverse. For, despite the existence of overwhelming bases for jurisdiction, the decision below arbitrarily extinguished Petitioner's claim, leaving Petitioner with no remedy at all.

Arguing in the alternative, even if, contrary to the principle stated in *Norwood* quoted above, Federal District Courts still have the discretion to dismiss a

case on the ground of *forum non conveniens,* the Court below grossly abused any such discretion on these facts: (1) Petitioner is an Arizona corporation and a citizen of the United States; (2) Respondent Baychem is a New Jersey Corporation doing a considerable amount of business in Arizona and a citizen of the United States; (3) the claim arose in Arizona; (4) the convenience of witnesses favors Arizona; (5) the Statute of Limitations has run in Mexico and in Arizona; and (6) there is no other forum in which the action can be brought.

Second, it is in any event an abuse of discretion to dismiss a case on the ground of *forum non conveniens* when it is not absolutely certain that jurisdiction of all parties and complete relief can be obtained in a supposedly more convenient Court. As is stated in 15 Wright, Miller and Cooper, *Federal Practice and Procedure, Jurisdiction:* § 3828:

> Dismissal on the basis of forum non conveniens requires that there be in fact an alternative forum in which the suit can be maintained. It must appear to a certainty that jurisdiction of all parties can be had and that complete relief can be obtained in the supposedly more convenient court. (Ten authorities cited)

In our case, there is a complete absence of any forum other than the Federal Court in Arizona, in which the suit may be brought against Respondents and complete relief may be had. And the Statute of Limitations has run in Mexico, and also in Arizona. See p. 10. The Court below arbitrarily extinguished Petitioner's claim.

Third, a citizen of the United States is entitled to special consideration in *forum non conveniens* cases.

Mobil Tankers Co. S.A. v. *Mene Grande Oil Co.* (C.A. 3, 1966) 363 F.2d 611, cert. den. 385 U.S. 945, 17 L.Ed. 2d 225, 87 S.Ct. 318; *Burt* v. *Isthmus Dev. Co.*, (C.A. 5, 1955) 218 F.2d 353, cert. den. 349 U.S. 922, 99 L.Ed. 1254, 75 S.Ct. 661. *Shulman* v. *Compagnie Generale Transatlantique* (D.C.N.Y. 1957) 152 F.Supp. 833.

Fourth, in arbitrarily extinguishing Petitioner's claim, the Court below emasculated 28 U.S.C. 1404(a); and also the statutory provisions providing for federal jurisdiction on the ground of diversity of citizenship, 28 U.S.C. 1332, etc. It went to an extreme not approached by any other case. It decided important questions which should be decided by this Court. It also reflects the conflict in the circuits, which conflict will affect numerous other litigants and create unnecessary litigation.

E. The Holding of the Court Below That Minimum Due Process Contacts of Respondents Were Not Present in Arizona Is in Conflict With Decisions of This Court:

1. The events that occurred in Arizona conferred jurisdiction under Arizona law:

The dismissal by the Court below of the action against Bayer de Mexico and Bayer A.G. on the ground of lack of *in personam* jurisdiction under the Arizona long-arm statute is flatly inconsistent with the minimum contacts test as laid down by this Court.

The law of Arizona provides for service of process upon a foreign defendant provided that the defendant has "caused an event to occur in this state out of which the claim which is the subject of the complaint arose". Rule 4(e)(2)(a), Rules of Civil Procedure, 16 A.R.S. See p. 4. Ordinarily, the exercise of jurisdiction

under this provision is reached by a two-stage analysis: (1) Whether the defendant has caused an event to occur in Arizona out of which the claim which is the subject of the complaint arose; and (2) whether the defendant has minimum contacts with Arizona such that the exercise of personal jurisdiction over him will be in conformity with the requirements of due process. The lower court's analysis of these questions was as follows:

> "Neither Bayer de Mexico nor Bayer AG did business in Arizona, and neither acted within the forum. The only effect alleged in Arizona was the loss to Mizokami when the chemically treated vegetables failed to gain entry into the United States.
>
> * * *
>
> Plaintiff alleges that Bayer de Mexico knew or should have known that the chemical would be used on crops intended for United States markets, including Arizona. These allegations do not provide the minimum contacts required by the Due Process Clause for personal jurisdiction." (A-2).

First, with respect to the beginning of the analysis, it does not state clearly whether the Court below held that defendant caused an event to occur in Arizona such that the Arizona statute's requirements were satisfied. To the extent that the Court below concluded that defendant did not cause an event to occur in Arizona, its decision was in serious factual error (see p. 7-8).

Moreover, aside from the serious factual errors of the Court below, to the extent that it concluded that no event occurred in Arizona, its decision is also flatly inconsistent with the Arizona Supreme Court's interpretation of its long-arm statute. Thus, in *Phillips* v.

Anchor Hocking Glass Corporation, 100 Ariz 251, 413 P2d 732 (Ariz Sup Ct., 1966), the Court stated that in cases of tort or product liability, a manufacturer causes an event to occur within the forum when he puts his product into the stream of commerce and the product eventually causes an injury to occur within the forum State. The case arose when a baking dish manufactured by defendant broke and injured plaintiff. The defendant's only contact with Arizona was the presence of the product in the State when the injury occurred. The Superior Court dismissed the complaint. But the Supreme Court reversed and remanded the case for consideration whether the exercise of jurisdiction under the statute was in conformity with the requirements of due process.

This reasoning is equally applicable to the instant case. The Respondents put their product, Tamaron, into the stream of commerce. Vegetables treated with the chemical reached the forum State; were tested in Arizona; and were there found to be in violation of Federal law. Then the FDA in Arizona caused an embargo to be imposed on further importation of peppers. Thus, all the Respondents caused events to occur in Arizona out of which the claim arose within the meaning of the statute as interpreted by the Arizona Supreme Court.

2. The decision below violates the minimum contacts test laid down by this Court:

With respect to the second half of the analysis, the decision of the Court below is inconsistent with the minimum contacts test laid down by this Court. Indeed, the minimum contacts test laid down by this Court is clear. A forum may exercise jurisdiction over a foreign defendant consistently with the requirements

of due process provided that the defendant has minimum contacts with the forum such that maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *International Shoe Co.* v. *Washington,* 326 U.S. 310, 316 (1945). Moreover, in appropriate circumstances, a single contact by the defendant with the forum may be sufficient to uphold jurisdiction. *McGee* v. *International Life Ins. Co.,* 355 U.S. 220 (1957).

In addition, other decisions that apply the minimum contacts test to cases of tort or product liability have held that when a manufacturer places a product into the stream of commerce, the product reaches the forum State, and injury occurs in the forum, it is consistent with the requirements of due process to require the manufacturer to defend his product in the forum State. *Gray* v. *American Radiator and Standard Sanitary Corp.* 22 Ill. 2d 432, 176 N.E.2d 761 (Sup Ct. Ill., 1961) *Duple Motor Bodies Ltd.* v. *Hollingsworth,* 417 F.2d 231 (9th Cir., 1969).

Moreover, in *Phillips* v. *Anchor Hocking Glass Corp.,* 100 Ariz 251, 413 P2d 732 (1966), *supra,* the Arizona Supreme Court found that these principles apply when jurisdiction is asserted under the Arizona long-arm statute. Indeed, the Court went even further than some jurisdictions and held that the foreseeability of the product's entry into the forum state was not a necessary prerequisite to jurisdiction. It said:

> "We do not think foreseeability itself is a necessary prerequisite to fairness. Cf Note, Products Liability and the Choice of Law, 78 Harv LR 1452. Ordinarily, a manufacturer is primarily interested in the consumption of his product, not where it is consumed. ***If his product is defective he may be***

> *held liable for the damage caused thereby whether suit is brought in his state or plaintiff's state.* The manufacturer should not necessarily be allowed to divorce himself from liability for a defective product solely because he cannot foresee where it will be consumed." 413 P2d at 737. (Emphasis added)

In the instant case, all the Respondents put their chemical product, Tamaron, into the stream of commerce; each Respondent had reason to foresee (though foreseeability is not necessary) that the chemical product would be applied to vegetables grown for exportation into Arizona. In fact, vegetables containing the residue of their product were physically imported into and present in Arizona and events occurred in Arizona: the FDA there caused the peppers physically located in Arizona to be destroyed, and an embargo to be imposed upon the further importation of peppers.

Thus, the elements needed to assert jurisdiction under the Arizona statute consistently with the requirements of due process were present. The holding of the Court below that Plaintiff's allegations did not provide the minimum contacts required by the Due Process clause is flatly inconsistent with the minimum contacts test as laid down by this Court, and as interpreted by the highest court of the State of Arizona.

3. Additional contacts of Bayer de Mexico with Arizona:

In addition, Bayer de Mexico and Baychem are mutual agents, and the actions of each are binding upon the other. See p. 6. It is fundamental that the principal is bound by and liable for the acts which his agent does within the scope of his authority. Restatement (Second) of Agency § 140 (1958).

II. ON A MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION, THE COMPLAINT AND OTHER MATERIAL SHOULD BE CONSTRUED FAVORABLY TO THE PLAINTIFF:

Motions to dismiss for lack of personal jurisdiction or lack of a convenient forum are commonly decided, as in our case, on the pleadings and special material outside the pleadings. There has been no trial. Hence, for the purpose of ruling on such motions, the pleadings and other material should be construed favorably to the Plaintiff. Wright and Miller, 5 *Federal Practice and Procedure: Civil* § 1363 (1969). *Jensen* v. *McInerney,* 299 F. Supp. 1309 (D.C., Virgin Islands, 1969). *United States* v. *Orshek,* 164 F.2d 741 (8th Cir., 1947).

III. IN THE ALTERNATIVE, QUESTIONS OF JURISDICTION IN PERSONAM SHOULD BE POSTPONED TO THE TRIAL:

Finally, if there should be any question as to jurisdiction *in personam* over Respondents, decisions on that question should be postponed to the trial when discovery, so far resisted by Respondents, can be had and all the facts can be developed, *Montgomery Ward & Co.* v. *Schumacher,* 3 FRD 368 (D.C. Cal., 1944).

CONCLUSION

For the reasons stated,

1. The Petition should be granted and the judgments below summarily reversed; or

2. The Petition should be granted and the case set for oral argument; or

3. The case should be summarily reversed as to Baychem, and remanded to the District Court with instructions to postpone, until the trial, decisions on

jurisdiction over Respondents Bayer de Mexico and Bayer A.G.

Respectfully submitted,

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November 23, 1977

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 75-2991

MIZOKAMI BROS. OF ARIZONA, INC.,
an Arizona corporation,
Appellant,

v.

BAYCHEM CORPORATION, a Delaware and New Jersey corporation; BAYER DE MEXICO, S.A., a corporation of the United States of Mexico; BAYER AG, a corporation of the Federal Republic of Germany; and COMPANIA VAMEX DE LOS MOCHIS, S.A., a corporation of the United States of Mexico,
Appellees.

Opinion

(filed July 7, 1977)

Before: ELY and GOODWIN, *Circuit Judges,* and SOLOMON,* *District Judge.*

Per Curiam:

Mizokami Bros. of Arizona, an importer of Mexican-grown produce for sale in the United States and Canada, sustained losses when United States Customs officers turned back a shipment of bell peppers at the Mexican border because the vegetables were contaminated with excessive residues of the chemical Tamaron. Mizokami sued Bayer AG and its corporate children, Bayer de Mexico and Baychem, in the United States District Court for the District of Arizona. The court dismissed the action against the first

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* The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

two defendants for want of *in personam* jurisdiction under Arizona's long-arm statute and against the third for reasons of *forum non conveniens*. We affirm.

Baychem manufactured the Tamaron in Missouri for Bayer AG, the world patent owner, who in turn sold it to Bayer de Mexico. Eventually it was sold to Mexican farmers who used it on crops bought by Mizokami. Neither Bayer de Mexico nor Bayer AG did business in Arizona, and neither acted within the forum. The only effect alleged in Arizona was the loss to Mizokami when the chemically treated vegetables failed to gain entry into the United States.

Mizokami attempted to predicate long-term liability against Bayer AG, the German parent of both Baychem and Bayer de Mexico, on the theory that Baychem, a subsidiary of Bayer AG, did business in Arizona. However, the business done in Arizona by Baychem was unrelated to the claim, and the mere existence of the parent-subsidy relationship is not alone a sufficient basis for long-arm jurisdiction of the parent. *Lycoming Division of Avco Corp.* v. *Superior Court*, 22 Ariz. App. 150, 524 P.2d 1323, 1326 (1974). Bayer AG was not alleged to have any other connection with Arizona.

Plaintiff alleges that Bayer de Mexico knew or should have known that the chemical would be used on crops intended for United States markets, including Arizona. These allegations do not provide the minimum contacts required by the Due Process Clause for personal jurisdiction. *See International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945); *Amba Marketing Systems, Inc.* v. *Jobar International, Inc.*, 551 F.2d 784 (9th Cir. 1977); *L. D. Reeder Contractors* v. *Higgins Industries, Inc.*, 265 F.2d 768, 773-774 (9th Cir. 1959). To the extent that the district court grounded its dismissal upon the failure of the complaint to allege facts establishing *in personam* jurisdiction, the judgment must be affirmed.

The dismissal of Mizokami's action against Baychem on the ground of *forum nonconveniens* must also be affirmed. The determination of the appropriateness of the doctrine is entrusted to the sound discretion of the trial court. *Paper Operations Consultants International, Ltd.* v. *SS Hong Kong Amber*, 513 F.2d 667 (9th Cir. 1975).

Here, an Arizona corporation seeks to maintain an action in a court of the United States against a Delaware corporation which has its headquarters in Missouri. Such cases are filed in the federal courts daily. But we have been cited no case in which the facts are quite like those presently before us. Numerous cases suggest that a defendant must meet an almost impossible burden in order to deny a citizen access to the courts of this country. We note particularly *Burt* v. *Isthmus Development Co.*, 218 F.2d 353 (5th Cir.), *cert. denied*, 349 U.S. 922 (1955), wherein the court stated:

> " • • • [C]ourts should require positive evidence of unusually extreme circumstances, and should be thoroughly convinced that material injustice is manifest before exercising any such discretion to deny a citizen access to the courts of this country. • • •" 218 F.2d at 357.

See also Leasco Data Processing Equipment Corp. v. *Maxwell*, 468 F.2d 1326 (2d Cir. 1972); *Olympic Corp.* v. *Societe Generale*, 462 F.2d 376 (2d Cir. 1972); *Hoffman* v. *Goberman*, 420 F.2d 423 (3d Cir. 1970); *Mobil Tankers Co.* v. *Mene Grande Oil Co.*, 363 F.2d 611 (3rd Cir.), *cert. denied*, 385 U.S. 945 (1966).

Despite the strong statements in favor of access, however, a United States citizen has no absolute right to sue in a United States court. *Vanity Fair Mills* v. *T. Eaton Co.*, 234 F.2d 633 (2d Cir.), *cert. denied*, 352 U.S. 871 (1956). Application of the *forum non conveniens* doctrine affords wide discretion to the district court. *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947).

The district court properly exercised its discretion in the present case. The plaintiff corporation claimed a relationship, not clearly defined, with certain Mexican growers. The complaint was of misrepresentations made to the growers in Mexico with respect to a chemical manufactured in Missouri and sold in Mexico by the defendants. All transactions between the parties, as well as the claim itself, arose in Mexico.

The plaintiff falls back on its United States citizenship as the sole and only possible basis for suing these defendants in a court of the United States. This is not enough. In an era of increasing international commerce, parties who choose to engage in international transactions should know when their foreign operations lead to litigation they cannot expect always to bring their foreign opponents into a United States forum when every reasonable consideration leads to the conclusion that the site of the litigation should be elsewhere.

There was no abuse of discretion.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

(Caption Omitted in Printing)

Order

(filed August 26, 1977)

Appeal from the United States District Court
for the District of Arizona

Before: ELY and GOODWIN, *Circuit Judges,* and SOLOMON,* *District Judge.*

The court has considered appellant's petition for rehearing filed July 22, 1977; the petition is denied.

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* The Honorable Gus J. Solomon, United States District Judge for the District of Oregon, sitting by designation.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

Civil Action File No. 73-188 TUC JAW

MIZOKAMI BROS. OF ARIZONA, INC.,
an Arizona corporation,

vs.

BAYCHEM CORPORATION, A Delaware and New Jersey corporation; BAYER DE MEXICO, S.A., a corporation of the United States of Mexico; BAYER AG, a corporation of the Federal Republic of Germany; and COMPANIA VAMEX DE LOS MOCHIS, S.A., a corporation of the United States of Mexico,

Judgment

(filed May 27, 1975)

This action came on for (hearing) before the Court, Honorable James A. Walsh, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered, granting defendants' Motion to Dismiss,

It is Ordered and Adjudged that the plaintiff, MIZOKAMI BROS. OF ARIZONA, INC., take nothing and that the action is dismissed as to defendants BAYCHEM CORPORATION, a Delaware and New Jersey corporation; BAYER DE MEXICO, S.A., a corporation of the United States of Mexico and BAYER AG, a corporation of the Federal Republic of Germany.

Dated at Tucson, Arizona, this 27th day of May, 1975.

W. J. FURSTENAU
Clerk of Court

/s/ LOUISE CLELLAND
By: Louise Clelland,
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

(Caption Omitted in Printing)

Judgment

(June 19, 1975)

This matter having come on for hearing on July 1, 1974 and again on May 24, 1975 on the respective motions on behalf of defendants Bayer AG, a corporation of the Federal Republic of Germany, and Bayer de Mexico, S.A., a corporation of the United States of Mexico, to quash the attempted service of process herein against said defendants for lack of personal jurisdiction over them and the motions on behalf of said defendants and also Baychem Corporation to dismiss this action pursuant to Rule 19(b) of the Federal Rules of Civil Procedure on the ground of *forum non conveniens*, upon the basis of the affidavits submitted in respect of said motions and, as well, the answers to interrogatories and the entire record herein, including the submissions of counsel for plaintiff and for each of said defendants and the oral arguments presented by counsel for plaintiff and counsel for each of said defendants at said hearings, and for the reasons stated in the opinion of the Court expressed at the conclusion of the hearing on May 24, 1975,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the attempted service of process herein against defendant Bayer AG, a corporation of the Federal Republic of Germany, and, as well, the attempted service of process against defendant Bayer de Mexico, S.A., a corporation of the United States of Mexico, is hereby quashed, the complaint herein is hereby dismissed against said defendants and also against Baychem Corporation and judgment, together with an award for costs, is hereby entered in favor of each of said defendants against plaintiff.

DONE IN OPEN COURT this ..... day of June, 1975.

/s/ JAMES A. WALSH
United States District Judge

The foregoing Judgment lodged with the Court this 5th day of June, 1975 and Copy mailed this 5th day of June, 1975, to:

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